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No.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1980

STANLEY KALMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Under the unique circumstances of this case, does a sentence of imprisonment violate the Eighth Amendment prohibition against cruel and unusual punishment?

PARTIES

Cr. No. 78-101
United States v. Stanley Kalman, Neil Burrei, et al.

Cr. No. 78-102
United States v. Stanley Kalman, Thomas Boyle, et al.

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Time-Life Pictorial History of World War II; *The Nazis*, pages 145, 169, 171 2

Petitioner, STANLEY KALMAN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 22, 1980.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, dated August 22, 1980, is reprinted in Appendix A, *infra*, at page A-1, *et seq.*

JURISDICTION

Following a jury trial before the HONORABLE THOMAS C. PLATT, sitting by designation in the United States District Court for the Western District of New York, Petitioner was found guilty on October 26, 1979, of one count of conspiracy to defeat the bankruptcy law and three substantive counts of bankruptcy fraud under Indictment 78-101. 18 U.S.C. §371, §152, §2. Following a second jury trial in the United States District Court for the Western District of New York before the HONORABLE JOHN T. CURTIN, Petitioner was found guilty on March 21, 1980, of one count of conspiracy to defeat the bankruptcy laws and three substantive counts of bankruptcy fraud under Indictment 78-102. On April 9, 1980, the HONORABLE THOMAS C. PLATT imposed a sentence consisting of concurrent five year terms of imprisonment, all but six months suspended pursuant to 18 U.S.C. §3651, with a three year probation term and a fine totaling $10,000. On May 28th, 1980, the HONORABLE JOHN T. CURTIN imposed a sentence consisting of concurrent 18 month terms of imprisonment, and directed that this sentence run concurrently with the earlier sentence imposed by Judge Platt. An additional $10,000 fine was imposed.

Petitioner's motion to consolidate the appeals of the judgments of the District Court was granted on June 5, 1980. The United States Court of Appeals for the Second Circuit affirmed the judgments of the District Court on August 22, 1980.

The jurisdiction of this Court is invoked under Title 18, United States Code, Section 1251(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII, which provides:

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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STATEMENT OF FACTS

Petitioner, STANLEY KALMAN, was born STANLEY KALMANOVITZ on April 18, 1931, in Lodz, Poland. Stanley's father was a professor of mathematics in Lodz and his mother was a housewife. (16, 84, 91)*

In 1935, the Kalmanovitz family emigrated to Paris. This move was caused by the increasing tide of anti-Semitic sentiment in Eastern Europe. In an attempt to spare the Kalmanovitz children from religious prejudice, Stanley and his older sister were raised as Roman Catholics. (16, 84, 88)

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*( ) refers to pages of Appendix filed in the United States Court of Appeals for the Second Circuit.

After the Nazi invasion of France, the Kalmanovitz family fled from Paris to Tulle. Once in Tulle, Stanley was placed in a Catholic boarding school. In 1942, Stanley's mother died of natural causes. (17, 84, 91)

In February, 1943, Stanley's father was arrested in Paris where he had joined the French underground. (17, 84, 91) Stanley and his sister went into hiding, but they were arrested approximately one month later by the French police. Stanley was temporarily incarcerated in a French prison where almost daily he witnessed the executions of captured resistance fighters. (17, 84-85, 91)

In the Spring of 1943, Stanley was deported to Auschwitz in a cattle car. An older prisoner advised Stanley to declare his age as 18 and to give his occupation as apprentice brick mason. (17, 85, 92)

Upon arrival at Auschwitz, Stanley informed the Nazis as advised by his fellow prisoner. As Stanley appeared older than his years, he was selected for forced labor rather than extermination. (17, 36, 85, 92) He was assigned to unload cement sacks from freight trains and was regularly beaten with shovels and clubs when he broke down under their weight. Such atrocities were prevalent in all Nazi concentration camps. [See, Time-Life Pictorial History of World War II; *The Nazis*, pages 145, 169, 171.] He learned to hide from the weekly "selections" during which the weak or infirm were singled out for extermination. He was the target of numerous homosexual advances which he resisted. At the time of his arrival in Auschwitz, Stanley was 12 years old. (17-18, 85, 92)

In the Winter of 1944-45, the advancing Soviet armies forced the evacuation of Auschwitz. Mr. Kalman and his fellow prisoners were forced to march on foot away from the collapsing eastern front. During this march, all stragglers were summarily shot. Other prisoners perished from exposure. (18, 85, 92) Once in Austria, Mr. Kalman and his fellow survivors were herded into

coal carts and transported to the concentration camp at Mauthausen. (18, 85, 92)

Mr. Kalman was subsequently transferred to the Ebensee concentration camp. (85) In May, 1945, Mr. Kalman was liberated by the United States Third Army. He was 14 years old. (18, 85, 92)

After a brief stay in a refugee camp, Mr. Kalman was repatriated to France. Once in Tulle, Mr. Kalman was reunited with his sister and learned that the Nazis had shot his father in 1943. (18, 85, 91-92)

Mr. Kalman spent the next several months recuperating and receiving medical treatment for the injuries he received during his stay in the Nazi camps. (18, 85, 92) In 1946, Mr. Kalman emigrated to the United States. (18, 85, 92)

For the next 30 years, Mr. Kalman was employed at a variety of jobs, married and raised a family. (19-22, 86) In 1975, Mr. Kalman started to work on the liquidation of the W.T. Grant Stores. (21) In 1976, Mr. Kalman began supervising the liquidation of several W.T. Grant stores in New York State and Vermont. (23) The liquidation of certain of these stores in Western New York formed the basis for Mr. Kalman's indictments. (23)

On July 18, 1978, Mr. Kalman was charged in two separate bankruptcy fraud indictments returned in the Western District of New York. Each indictment (Nos. 78-101 and 78-102) contained a single conspiracy count (Title 18, United States Code, §371) and three substantive counts of bankruptcy fraud (Title 18, United States Code, §152, §2).

After two jury trials before District Judges Platt and Curtin, Mr. Kalman was found guilty on all four counts of each indictment. Mr. Kalman presented no witnesses on his own behalf at either trial. (4, 10)

Subsequent to Mr. Kalman's second conviction on March 21, 1980, defense counsel prepared a detailed pre-sentence memorandum which was submitted to both Judge Platt and Judge Curtin. (66, 97-98) Defense counsel also contacted Doctor Norman Solkoff, a professor of Psychology with extensive experience in Holocaust analysis. (60) Based on Mr. Kalman's biographical data provided by defense counsel, Dr. Solkoff formulated an opinion with respect to the potential impact of incarceration on Mr. Kalman. In a letter to Judge Platt, Dr. Solkoff noted that "imprisonment would pose an enormous threat to his [Kalman's] future mental health." Dr. Solkoff also stated that:

> "One effect of incarceration could be a recreation of the extermination camp experiences *so that any hope for rehabilitation could be wiped out* . . . imprisonment could escalate the speed of psychological deterioration and increase the probability of suicidal behavior." (61, emphasis supplied)

Mr. Kalman was sentenced by Judge Platt on April 9, 1980. (11) The Government recommended that the Court impose a period of imprisonment. (72)

Prior to sentence, defense counsel related that from its inception the objective of Mr. Kalman's legal defense was to avoid imprisonment. (72-74) This objective was dictated by Mr. Kalman's abominable experiences in the concentration camps and his immeasurable fear that he cannot survive additional confinement. (59, 72-73, 75-76) The Court was also apprised of counsel's pre-trial plea negotiations to secure a recommendation of no imprisonment from the Government and of the Government's final response that it was considering a recommendation for the maximum imprisonment. (73-74)

Judge Platt imposed a split sentence of six months imprisonment followed by three year's probation pursuant to Title 18, United States Code, §3651, together with a $10,000 fine. The

Judge recommended that Mr. Kalman serve his imprisonment at a minimum security facility on the West Coast. (79-80)

Subsequent to the imposition of this sentence, defense counsel provided a general description of Federal minimum security institutions to Mr. Kalman. For the first time, Mr. Kalman began to detail a number of personal activities he is unable to perform in public. (100) Defense counsel perceived the critical need to have Mr. Kalman psychiatrically examined and immediately requested an adjournment of sentence before Judge Curtin for the purpose of securing the necessary psychiatric evaluations. (10, 98)

Mr. Kalman was examined in California by Doctors Klaus Hoppe, Frederick Ilfeld and William Niederland. (84-95) Doctors Hoppe and Niederland are acknowledged experts in the particularized field of psychoanalyzing Holocaust survivors. (Record)

On April 14, 1980, Doctor Klaus Hoppe examined Mr. Kalman and submitted a report to defense counsel. (84-85) Doctor Hoppe stated that Mr. Kalman suffers from "chronic reactive depression" (86) and noted that:

> "If the patient [Kalman] would be incarcerated again, a very serious relapse and revival of the old traumatic experiences could very likely occur and the possibility of a suicide attempt cannot be ruled out." (86)

On May 2, 1980, Doctor Frederick W. Ilfeld, Jr., examined Mr. Kalman and also submitted a report to defense counsel. (88-89) After briefly noting some details of Mr. Kalman's life history, Doctor Ilfeld noted the following about Mr. Kalman:

> "... [he] has adjusted marginally in the past thirty-five years. He has been chronically and severely affected. ... He is unable to disrobe with other people around. In thirty-five years, he has never used a public bathroom and will never again. He must wear different clothes everyday, as memories of his picking lice out of his camp uniform surface ..." (88-89)

Doctor Ilfeld stated that it was difficult for Mr. Kalman to discuss specifics about his experiences in the Nazi death camps. (89) However, the Doctor did manage to extract information about Mr. Kalman's aversion to public bathrooms. Doctor Ilfeld related how Mr. Kalman:

> "... with shaking and tearful sobs recalled the rows of sinks and water running from one sink to another filled with urine, stools and vomit. This was the most popular place for inmates to commit suicide, and he recalls their doing so by drowning themselves in excrement." (89)

In his diagnosis, Doctor Ilfeld stated that Mr. Kalman suffers from "post traumatic stress disorder" along with a concomitant "sleep disturbance and memory impairment." (88) Doctor Ilfeld explained that Mr. Kalman's:

> "... already serious symptoms are greatly intensified by exposure to events that symbolize or resemble the concentration camp experience." (89)

Finally, Doctor Ilfeld provided the opinion that:

> "... it would be a grave danger to this client's life to incarcerate him. *At the very least, even should he physically survive such an experience, this already crippled man would be more severely handicapped.*" (89, emphasis supplied)

On May 10, 1980, Doctor William G. Niederland examined Mr. Kalman. (90-95) Doctor Niederland noted that Mr. Kalman suffers from "delayed stress syndrome" (93) and that he "lives under great stress with a high degree of affective disturbance and personal unhappiness." (94) Further, Doctor Niederland stated that Mr. Kalman's:

> "... terror of imprisonment is at present so extreme for him, because it holds — in his conscious and subconscious mind — the *significance of a potential death sentence* or, at least, of a renewed existence in the shadows of the Auschwitz or Mauthausen crematoriums." (95, emphasis supplied)

These psychiatric evaluations were submitted to Judge Curtin. (98, 102) On May 28th, 1980, Judge Curtin sentenced Mr. Kalman to 18 month's imprisonment to run concurrent with the earlier sentence imposed by Judge Platt. (12, 103) The Court also fined Mr. Kalman $10,000. (103-4) In passing sentence, Judge Curtin stated that he had reviewed the submissions made on behalf of Mr. Kalman, but noted that "this is a problem for the Bureau of Prisons and not for the Court." (102) In affirming Mr. Kalman's sentences, the Court of Appeals stated:

> "Though Kalman's ordeal in the 1940's evokes sympathy, it does not render the sentences unconstitutional or an abuse of either judges discretion. As a general matter, a sentence within statutory limits will not be considered cruel and unusual punishment . . ." (Appendix A, *infra*)

REASON FOR GRANTING THE WRIT

Under the circumstances of this case, does a sentence of imprisonment violate the Eighth Amendment prohibition against cruel and unusual punishment.

As a general proposition, a sentence imposed by a District Court within statutory limits is not subject to review. *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Tucker*, 404 U.S. 443, 447 (1972). In affirming Petitioner's sentence, the Second Circuit thus noted that a sentence within statutory limits will generally not be considered cruel and unusual punishment. Appendix A, *infra*, P. A-2, citing *United States v. Dawson*, 400 F.2d 194 (2d Cir., 1968), *cert. denied*, 393 U.S. 1023 (1969).

However, both this Court and the Circuit Courts have on occasion exercised limited supervisory review of District Court sentences in certain cases. The exercise of this type of appellate review has been based on a variety of rationales.

In *Yates v. United States*, 356 U.S. 363 (1958), this Court reduced the sentence of the petitioner under its "supervisory power over the administration of justice in the lower federal courts . . ." 356 U.S. at 366, 367. In *Yates*, the District Court had failed to exercise its sentencing discretion in light of the earlier reversal and remand by this Court. This Court thus had no alternative but to reduce the sentence. 356 U.S. at 366.

Although *Yates, supra,* is factually distinguishable from Petitioner's case, it is of value to illustrate the concept that this Court may exercise a supervisory review of a District Court sentence in an exceptional case. The "Statement of Facts" in this application demonstrates that the Petitioner's claim is exceptional and deserving of review.

Throughout the history of American jurisprudence, the Eighth Amendment "has been interpreted in a flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

In *Gregg, supra,* this Court expressly reiterated its prior conceptual pronouncements which compel an ever developing construction of the Eighth Amendment. 428 U.S. at 170-174. In reaffirming these pronouncements, the *Gregg* Court unequivocably embraced the conclusion of the late Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), that:

> "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 428 U.S. at 173.

This Court then announced a two-pronged test for ascertaining Eighth Amendment violations:

> "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." 428 U.S. at 173; citations omitted.

In *Coker v. Georgia*, 433 U.S. 584 (1977), this Court held that a punishment which violated either prong of the test as enunciated

in *Gregg, supra,* was constitutionally impermissible under the Eighth Amendment:

> "Under *Gregg,* a punishment is 'excessive' and unconstitutional if it (1) makes no *measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or* (2) is grossly out of proportion to the severity of the crime." 433 U.S. at 592
>
> See also *Estelle v. Gamble,* 429 U.S. 97, 102-105 (1976).

Although death has been the form of punishment most frequently challenged as violative of the Eighth Amendment, this Court has condemned non-capital penalties. In *Trop v. Dulles,* 356 U.S. 86 (1958), this Court was confronted with an Eighth Amendment challenge to the denationalization of a wartime army deserter. The petitioner could have been executed for his desertion, instead, he was imprisoned and stripped of his citizenship. Despite the fact that denationalization as punishment for wartime desertion could not be considered excessive with respect to the gravity of the offense, this Court held that it violated the Eighth Amendment. 356 U.S. at 99, 101.

In *Trop,* after noting that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man," this Court stated that:

> "[t]his punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a *fate of ever increasing fear and distress* . . ." 356 U.S. at 102; emphasis supplied.

This Court's language in *Trop, supra,* is particularly applicable to this case. This Court should note that Petitioner Stanley Kalman does not attack the constitutionality of the statutes under which he was sentenced. Petitioner does not assert that concurrent sentences of six and 18 month's imprisonment may never be imposed for violations of the bankruptcy law.

However, Mr. Kalman has demonstrated that the inhumane treatment he suffered in the Nazi death camps will cause immeasurable mental anguish and possibly death in the event of future imprisonment. Predicated upon that particularized factual showing, he contends that the imprisonment portions of the sentences below are cruel and unusual.

From the unrefuted psychiatric evaluations, it is abundantly clear that imprisonment will involve more than mere physical confinement. It will forcibly and invariably propel Mr. Kalman back to the terrors of Auschwitz. Undeniably, such a horrible journey is both "grossly disproportionate to the severity of the offense" and an "unnecessary and wanton infliction of pain." *Gregg, supra,* 428 U.S. at 173.

Imprisonment in this case constitutes nothing less than a direct repudiation of this Court's unswerving command that criminal sentences must be individualized. *Williams v. New York,* 337 U.S. 241 (1949); *United States v. Grayson,* 438 U.S. 41 (1978); *Roberts v. United States,* ____ U.S. ____, 100 S. Ct. 1358 (1980).

CONCLUSION

For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the Second Circuit

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of August one thousand nine hundred and eighty.

Present: HONORABLE JON O. NEWMAN, HONORABLE AMALYA L. KEARSE, Circuit Judges. HONORABLE EDWARD DUMBAULD, District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

NEIL BURREI and STANLEY KALMAN,

Appellants.

80-1148
80-1160
80-1209

ORDER

Neil Burrei and Stanley Kalman were convicted of bankruptcy fraud offenses in violation of 18 U.S.C. §§371, 152, 2 (1976). They

were tried together in the United States District Court for the Western District of New York before Judge Thomas C. Platt, sitting by designation, and a jury. In addition, Kalman was tried for a separate violation of the same statutes in the Western District of New York before Chief Judge John T. Curtin and a jury. Burrei appeals from the conviction, claiming that there was insufficient evidence to convict. Kalman appeals from his sentences, claiming that they constituted abuses of discretion and violations of the Eighth Amendment.

The evidence at trial showed that Kalman, a professional field liquidator hired by the bankrupt W.T. Grant Co. to supervise the closing of a number of its stores, developed and implemented a plan to defraud Grant's creditors. According to this plan, Kalman and a co-conspirator, Michael Freeman, permitted various Grant store managers to buy the merchandise remaining in the store toward the end of the store's liquidation sale for a disproportionately low value, and placed an entry on the books indicating that the store was closed. The store would then be kept open one or two more days, and the profit resulting from the sales during those remaining days would be divided among Kalman, Freeman and the store manager. This fraud was carried out in at least four separate stores in upstate New York. Burrei was one of the store managers who participated. In Burrei's store, the remaining merchandise, whose value was estimated by one government witness as $20,000, was bought by Burrei for $550, and then sold the next day for $8,000, with the $7,500 profit being divided among Burrei, Kalman and Freeman.

On appeal, Burrei claims that he bought the merchandise in good faith, and took the risk that he would be able to make a profit on it without knowledge of the actual value of the merchandise. The jury, however, under proper instructions, found

that he acted with fraudulent intent, and there was sufficient evidence for reasonable jurors to find him guilty beyond a reasonable doubt. See *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972). Freeman's testimony described the entire plan, and related that Burrei had been approached, had agreed to participate, and had given Freeman $5,000 of the resulting profits. In addition, a store employee testified that he had been paid an extra $150, over and above his regular salary, to work during the final day, and that the sales procedures during that day were atypical. Several other witnesses provided corroborating testimony concerning the value of the remaining merchandise, the unexpectedly early official closing of Burrei's store, and the unusual nature of the sales practices on the final day.

Kalman appeals only from his sentence. Judge Platt imposed a split sentence, under 18 U.S.C. §3651, of five years' imprisonment, suspended after six months' imprisonment, followed by three years' probation, and a fine of $10,000; Judge Curtin imposed an eighteen-month prison term, to be served concurrently with the six-month term, and an additional $10,000 fine. Both judges recommended that the sentence be served at a minimum security institution on the West Coast, near Kalman's home. Kalman argues that these sentences constitute cruel and unusual punishment, since the traumatic experiences of his youth, including imprisonment in Nazi concentration camps, would render any further imprisonment at the present time a serious danger to his psychological well-being. Though Kalman's ordeal in the 1940's evokes sympathy, it does not render the sentences unconstitutional, or an abuse of either judge's discretion. As a general matter, a sentence within statutory limits will not be considered either cruel and unusual punishment, see *United States v. Dawson*, 400 F.2d 194 (2d Cir. 1968),

APPENDIX A
Opinion of the United States Court of Appeals for the Second Circuit

cert denied, 393 U.S. 1023 (1969); *Overstreet v. United States*, 367 F.2d 83 (5th Cir. 1966), or an abuse of discretion, see *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977). Bankruptcy fraud carries a maximum penalty of five years' imprisonment, but Kalman was sentenced to a total of eighteen months, with a recommendation that the sentence be served in a minimum security institution. The transcripts of the sentencing hearings reveal that Kalman's experiences were in fact taken into consideration by both judges. There is no merit to the claim that Judge Platt ignored the criterion of 18 U.S.C. §3651 that the "best interests" of the defendant, as well as the public, be considered. This criterion applies as a limit upon the sentencing judge's discretion to *suspend* a portion of the sentence imposed; it is not an additional criterion for imposing a sentence.

The judgments are affirmed.

/s/ JON O. NEWMAN
/s/ AMALYA L. KEARSE
Circuit Judges.
/s/ EDWARD DUMBAULD
District Judge.

UNITED STATES COURT OF APPEALS
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